United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: March 6, 2015

TO: Jonathan Kreisberg, Regional Director
Region 1

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Chestnut Health and Rehabilitation Group d/b/a Blue Hills Health and Rehabilitation, LLC 530-4825-6700 530-6050-0120
Case 01-CA-133937

The Region submitted this case for advice regarding whether the Employer, a *Burns*[1] successor, was obligated to bargain with the Union before converting a predecessor unit of registered nurses to supervisors. We conclude that under extant Board law, the Employer was not a "perfectly clear" successor and therefore was privileged to set initial terms and conditions, including the conversion of RNs to supervisors. [redacted]. Therefore, the Region should dismiss the charge, absent withdrawal.

FACTS

This case involves a nursing facility located in Stoughton, Massachusetts, which provides care for the elderly and infirm, and formerly was operated by Kindred Healthcare. The 1199 SEIU represented a longstanding unit of LPNs and CNAs employed by Kindred, and the parties' most recent collective-bargaining agreement covering that unit was effective October 31, 2012 through May 31, 2015. The Charging Party Union here, General Teamsters, Chauffeurs, Warehousemen & Helpers of Brockton and Vicinity, Local 653, filed a petition to represent a unit of Kindred's registered nurses (RNs) in January 2013, won an election, and was certified

[1] *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

[2] *Spruce Up Corp.*, 209 NLRB 194 (1974), *enforced*, 529 F.2d 516 (4th Cir. 1975).

on February 26, 2013. Kindred and the Union engaged in bargaining for a collective-bargaining agreement until about October 2013, when Kindred notified the Union it would no longer operate the facility as of July 1, 2014, and the parties agreed it would be futile to continue bargaining.

In March 2014,[3] Kindred notified the Union that Blue Hills Health and Rehabilitation, LLC had been awarded the contract to operate the facility as of July 1 and that Blue Hills intended to change the duties of the RNs. In mid-May, Blue Hills' representatives visited the facility and distributed information to the employees, including position descriptions. The RNs' position descriptions stated that they would have supervisory authority. It was clear that Blue Hills intended to retain the existing staff, but that it also intended to grant the RNs supervisory duties. At all facilities Blue Hills runs, RNs are supervisory employees based on their independent authority to discipline employees and their preparation of employee performance appraisals that affect pay increases and bonuses.

On May 30, a Union representative met with a Blue Hills representative and requested Blue Hills recognize and bargain with the Union as the representative of the RNs. Blue Hills told the Union that all its RNs are supervisory employees and that it saw no reason to bargain with the Union. The Union representative said that he assumed this would be the case because he had been told by the RNs that Blue Hills intended to hire them as supervisory employees. The Union did not object to Blue Hills' intent to hire the RNs as supervisors, nor did the Union request to bargain over the effects of this decision.

Prior to its takeover of the facility on July 1, Blue Hills recognized the 1199 SEIU as the representative of the LPNs and CNAs and assumed the terms of the extant collective-bargaining agreement.

In July, after Blue Hills had assumed operations of the facility, the RNs notified the Union that they were not exercising supervisory authority. A Union representative contacted Blue Hills in late July to inquire about this, and Blue Hills told him that the RNs were going to be trained as supervisors later that week. Nevertheless, the Union sent a letter dated July 30 requesting Blue Hills recognize and bargain with the Union as the representative of the RNs. On July 31 and August 1, Blue Hills conducted supervisory training of the RNs and told them they were responsible for issuing discipline and for completing employee performance evaluations. The Region has determined that the RNs are in fact Section 2(11) supervisors.

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[3] All dates are 2014 unless otherwise specified.

ACTION

We conclude that Blue Hills, a *Burns* successor, was not a "perfectly clear" successor under extant Board law and was privileged to set initial terms and conditions, including converting the RNs into supervisors. [redacted]

An employer succeeds to the bargaining obligations of its predecessor where the new employer continues the predecessor's business in substantially the same form and a majority of the new employer's workforce was formerly employed by the predecessor.[4] Under *Burns*, the successor ordinarily is permitted to unilaterally set initial terms and conditions of employment, unless it is "perfectly clear" that a successor employer plans to retain all the employees in the unit.[5] The Board has limited this "perfectly clear" exception to instances where the successor either failed to clearly announce its intent to change terms and conditions of employment or misled employees into believing they would be employed without such changes.[6] Recently, the General Counsel has taken the position that the Board should reconsider its decision in *Spruce Up* and return to the plain language of the "perfectly clear" caveat set forth in *Burns*.[7] Under that plain language, whenever it is "perfectly clear" that a successor plans to retain the predecessor's workforce, regardless of what it has

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[4] *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987); *Burns*, 406 U.S. at 279-81.

[5] *Burns*, 406 U.S. at 294-95.

[6] *Spruce Up Corp.*, 209 NLRB at 195; *see also Canteen Co.*, 317 NLRB 1052, 1052-54 (1995) (7th Cir. 1997) (where successor employer failed to announce lower wage rates until after inviting employees to apply for employment, it was "perfectly clear" that the successor planned to retain the predecessor employees and the successor could not unilaterally change wage rates), *enforced* 103 F.3d 1355; *Planned Building Services*, 318 NLRB 1049, 1049 (1995) (successor that stated intent from the outset to hire predecessor employees on different terms and conditions of employment was not a "perfectly clear" successor and was not obligated to consult with the union prior to setting initial terms and conditions of employment).

[7] *See Burns*, 406 U.S. at 294-95.

communicated to employees, the successor must first bargain with the union that represents the workforce before fixing initial terms.[8]

Here, Blue Hills is a *Burns* successor because it continued Kindred's business in substantially the same form and a majority of its workforce is made up of former Kindred employees. However, Blue Hills is not a "perfectly clear" successor under *Spruce Up* because Blue Hills announced changes in mid-May to the RNs' terms of employment when its representatives first visited the facility. At that time, Blue Hills made clear to the RNs its intent to add supervisory duties to their positions. Therefore, per *Spruce Up*, Blue Hills did not violate Section 8(a)(1) and (5) by announcing its intent to hire the RNs as supervisors without first bargaining with the Union.

[redacted] The Union arguably acquiesced in Blue Hills' decision to give the RNs supervisory duties by saying at the May 30 meeting that it had already been told of this change by the RNs and it had assumed Blue Hills would not recognize the Union and then failing to demand bargaining over the change or its effects. Moreover, Blue Hills provided evidence that it gave RNs supervisory authority in accordance with its operating model at all the facilities that it operates. There is also no evidence that Blue Hills made the change to destroy the bargaining unit or to avoid a bargaining obligation. In fact, Blue Hills recognized 1199 SEIU as the representative the LPNs and CNAs and adopted its collective-bargaining agreement with Kindred. [redacted]

Accordingly, the Region should dismiss the instant charge, absent settlement.

/s/
B.J.K.

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[8] *See Novel Service Group, Inc.*, Cases 02-CA-113834, et al., Advice Memorandum dated July 17, 2014, at pp. 7-14.